

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Nova Cellular West, Inc.,)	
)	
Petitioner,)	
)	
v.)	File No. EB-00-MD-022 ¹
)	
AirTouch Cellular,)	
)	
Respondent.)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: July 18, 2002

Released: July 25, 2002

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny a Petition for Declaratory Ruling filed by Nova Cellular West, Inc. ("Nova").² The Petition alleges that, by failing to provide electronic billing tape to Nova in connection with numerous cellular telephone service rate plans, AirTouch Cellular ("AirTouch") unreasonably restricted Nova's ability to resell the service, in violation of section 20.12 of the Commission's rules³ and sections 201(a), 201(b), and 202(a) of the Communications Act of 1934, as amended ("Act").⁴ The Petition further contends that AirTouch unreasonably discriminated against Nova by failing to change rate plans for Nova in the same timely manner that AirTouch did for other customers, in violation of section 202(a) of the Act. We deny Nova's claims regarding the provision of electronic billing tape for resale purposes, because a settlement and release agreement previously executed by Nova and AirTouch waives these claims and limits Nova's remedy to seeking enforcement of the settlement agreement itself under California law. We also deny Nova's claims about changing rate plans, because Nova failed to demonstrate that AirTouch treated Nova differently in this regard than any other similarly-situated AirTouch customer.

¹ The file number previously assigned to this matter was ENF-00-002. When citing to the parties' pleadings, this Order refers to the prior file number.

² Petition for Declaratory Ruling, File No. ENF-00-002 (filed Feb. 21, 2000) ("Petition").

³ 47 C.F.R. § 20.12, effective September 23, 1996, 61 Fed. Reg. 38388 (July 24, 1996), *modified*, effective January 10, 2000, 64 Fed. Reg. 61022 (Nov. 9, 1999) ("Resale Rule").

⁴ 47 U.S.C. §§ 201(a), 201(b), and 202(a).

II. BACKGROUND

A. The Parties

2. Nova is a corporation with its principal place of business in Encinitas, California.⁵ Under the name “San Diego Wireless,” Nova provides cellular and other commercial mobile radio service (“CMRS”) in the San Diego, California area as a reseller of the services of facilities-based CMRS providers.⁶ Nova was a reseller of AirTouch services in the San Diego area from 1986 until May 1999.⁷

3. AirTouch is a corporation with its headquarters in San Francisco, California.⁸ AirTouch provides cellular service in the San Diego, California Standard Metropolitan Statistical Area (“SMSA”)⁹ as a common carrier, pursuant to a license issued by the Commission.¹⁰

4. AirTouch offers cellular service pursuant to wholesale rate plans (designed for resellers) and retail rate plans (designed for AirTouch’s own retail customers).¹¹ Unlike its retail rate plans, AirTouch’s wholesale rate plans generally are equipped to provide resellers with electronic billing tapes that sets forth the usage of the phones assigned to the plans.¹² According to the Petition, such tapes enable larger resellers, like Nova, to bill their numerous customers in a timely and efficient manner.¹³

B. California Public Utilities Commission Proceeding

5. In 1996, Nova sought to purchase from AirTouch access and airtime pursuant to certain promotional retail rate plans that Nova believed offered more favorable rates than the

⁵ Petition, Exhibit 1 (First Amended Complaint for Damages and Injunctive Relief, *Nova Cellular West, Inc. v. AirTouch Cellular, Inc.*, No. C 99-2142 [CAL], United States District Court, Northern District of California (filed May 25, 1999)) (“District Court Complaint”) at 2, ¶ 4.

⁶ *Id.*; Joint Stipulation of Stipulated Facts and Disputes Remaining, File No. ENF-00-002 (filed Apr. 14, 2000) (“Joint Stipulation”) at 2, ¶¶ 2-3.

⁷ Petition, Exhibit 8 (Wheatland District Court Declaration) at 2, ¶ 4.

⁸ Petition, Exhibit 1 (District Court Complaint) at 2, ¶ 5.

⁹ The Commission uses SMSAs, which the Office of Management and Budget defines based on population statistics, to allocate cellular radio licenses.

¹⁰ Response to Petition for Declaratory Ruling, File No. ENF-00-002 (filed Apr. 3, 2000) (“Response to Petition”) at 5-6, ¶ 13; Petition, Exhibit 1 (District Court Complaint) at 2, ¶ 5. At the time Nova filed the Petition, the licensee of record for the San Diego B-block cellular license was Vodafone AirTouch Licensees, LLC. As of April 3, 2000, the license was transferred to Cellco Partnership, a subsidiary of Verizon Wireless. *See* Reply of AirTouch Cellular, File No. ENF-00-002 (filed Apr. 18, 2000) (“Reply”) at 1 n.1.

¹¹ *See* Nova Cellular West, Inc. d/b/a [sic] Consolidated Reply to AirTouch Cellular’s Response to Petition for Declaratory Ruling & Motion to Dismiss, File No. ENF-00-002 (filed Apr. 11, 2000) (“Nova Consolidated Reply”) at 2; Response to Petition, Exhibit 7 (Declaration of Monica Chang) (“Chang Declaration”) at 1, ¶¶ 2-3.

¹² Response to Petition, Exhibit 7 (Chang Declaration) at 1, ¶¶ 2-3; Petition, Exhibit 8 (Declaration of Paul Wheatland in Opposition to Defendant’s Motion to Refer to the FCC, dated August 6, 1999) (“Wheatland District Court Declaration”) at 2-3, ¶ 6.

¹³ Petition, Exhibit 1 (District Court Complaint) at 5-6, ¶ 19.

wholesale rate plans then available.¹⁴ AirTouch informed Nova that Nova could purchase under any retail plan for resale, but that electronic billing tapes to facilitate Nova's billing of its customers were not available in connection with retail plans.¹⁵

6. Dissatisfied with AirTouch's response, Nova filed a complaint against AirTouch with the California Public Utilities Commission ("CPUC") on December 13, 1996.¹⁶ The 1996 CPUC Complaint alleged that AirTouch unlawfully refused Nova's request to purchase access and airtime under AirTouch's "Easy 21 Plan" (and, later, a modified version of that plan) "by characterizing it as a retail plan under which Nova would not receive a magnetic tape containing call records along with a summary hard copy bill."¹⁷ The 1996 CPUC Complaint sought an injunction preventing "AirTouch from continuing to bill and collect from Nova for charges under a rate plan other than the Easy 21 Plan, as modified, *or such other favorable plan* that [Nova] and [AirTouch] agree upon."¹⁸

7. The parties resolved the litigation before the CPUC ("CPUC Proceeding") by entering into a Compromise Agreement and General Release dated April 30, 1997 ("Settlement and Release"), which provides in relevant part:

In consideration of the mutual covenants contained herein *and upon satisfaction of the conditions set forth at Paragraph 4 below*, the parties agree as follows:

1. Nova and AirTouch hereby release and forever discharge each other ... separately and collectively from *any and all claims*, liens, demands, causes of action, obligations, damages and liabilities, known or unknown, that each party has had in the past, or *now has, or may have in the future* against each other, *arising out of the matters involved in the formal complaint proceeding* commonly known as Nova Cellular West v. AirTouch Cellular, Public Utilities Commission of the State of California

* * *

4. As a condition to and on the condition of Nova's actions as required in Paragraph 5 below [Nova's agreement to dismiss the suit with prejudice], AirTouch ... (b) *hereby agrees to make retail pricing plans which are offered by AirTouch in San Diego available to Nova in a wholesale billing tape format whenever AirTouch's currently existing billing system is capable of doing so.*

¹⁴ *Id.* at 2, ¶¶ 4-5.

¹⁵ *Id.*

¹⁶ Nova Consolidated Reply, Exhibit 16 (Amended Complaint & Request for Immediate Cease & Desist Order, *Nova Cellular West, Inc. d/b/a San Diego Cellular v. AirTouch Cellular of San Diego*, C 96-12-027, Before the Public Utilities Commission of the State of California (filed Apr. 10, 1997) ("1996 CPUC Complaint")).

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 3-4 (emphasis added).

* * *

14. This [Settlement and Release] shall be construed and enforced pursuant to the domestic laws of the State of California.¹⁹

8. Nova construes the Settlement and Release as an agreement by AirTouch that it “would eventually be able to provide [Nova] with the appropriate bills in electronic format.”²⁰ Nova further maintains that, despite the passage of years, AirTouch failed to fulfill this commitment and continued to profess an inability to provide electronic billing tapes in connection with retail rate plans.²¹

9. Nova compared the retail rates for the plans it sought versus the wholesale rates for the plans it was receiving, and concluded that AirTouch had “overcharged” it by \$221,000.²² Accordingly, Nova deducted \$221,000 from the amount AirTouch billed.²³ In response, AirTouch demanded full payment, and, on May 11, 1999, terminated service to Nova for non-payment.²⁴

C. United States District Court Proceeding

10. On May 25, 1999, Nova sued AirTouch in the United States District Court for the Northern District of California.²⁵ The District Court Complaint alleges that AirTouch unlawfully denied Nova access to certain rate plans that AirTouch had made available to other customers: plans, promotions, and special offers that were not available to Nova “because an electronic billing format for these offerings has not been developed for resellers.”²⁶ The District Court Complaint asserts violations of sections 201(a), 201(b), and 202(a) of the Act, as well as the Resale Rule.²⁷

11. Like the 1996 CPUC Complaint, the District Court Complaint stems from Nova’s inability to obtain from AirTouch electronic billing tapes for desired rate plans, and challenges the validity of AirTouch’s assertion that it lacks the capability to provide such tapes.²⁸ Specifically, the District Court Complaint avers that, “[a]s early as May 1997” (just after the parties entered the Settlement and Release), AirTouch offered its retail customers various plans,

¹⁹ Petition, Exhibit 11 (Settlement and Release) at 1-2, 5, ¶¶ 1, 4, 14 (emphasis added); *see* Joint Stipulation at 3, ¶ 11.

²⁰ Petition, Exhibit 8 (Wheatland District Court Declaration) at 2, ¶ 5.

²¹ *Id.* at 2-3, ¶¶ 6-7.

²² Petition, Exhibit 1 (District Court Complaint) at 4-6, ¶¶ 15-20.

²³ *Id.* at 6-7, ¶¶ 20-23; *see* Joint Stipulation at 3, ¶ 7.

²⁴ Petition, Exhibit 1 (District Court Complaint) at 6-7, ¶¶ 23-25; *see* Joint Stipulation at 3, ¶ 8.

²⁵ *Id.*; *see* Joint Stipulation at 4, ¶ 13.

²⁶ *Id.* at 5-6, ¶ 19.

²⁷ Petition, Exhibit 1 (District Court Complaint) at 7-10, ¶¶ 27-46. In addition, the District Court Complaint asserts six state law claims, including intentional interference with prospective economic opportunity, intentional misrepresentation, unfair business practices, intentional interference with contractual relations, conversion, and trespass, as well as a cause of action seeking injunctive relief. *Id.* at 10-17, ¶¶ 47-87.

²⁸ Petition, Exhibit 8 (Wheatland District Court Declaration) at 1-3, ¶¶ 2, 5-7.

discounts, and promotions, but that AirTouch effectively denied Nova access to these plans, discounts, and promotions by failing to provide an electronic billing format.²⁹ According to Nova, detailed electronic billing would provide:

the call detail necessary for NOVA to bill its own customers. AIRTOUCH'S unwillingness to provide an electronic bill for any service offering thus insulates any such service offering from resale, thereby discriminating against NOVA and similarly-situated resale customers.³⁰

12. AirTouch moved to dismiss the complaint in its entirety or, alternatively, to refer to the Commission the claims arising under the Communications Act.³¹ On October 8, 1999, the district court dismissed the Communications Act claims, without prejudice, pursuant to the doctrine of primary jurisdiction, and stayed the remaining state law claims.³² The court further ordered Nova to "submit its First, Second, Third and Fourth Causes of Action to the FCC."³³

D. The Instant Proceeding

13. Based on the district court's ruling, Nova submitted its Communications Act claims to this Commission in a Petition for Declaratory Ruling, alleging violations of sections 201(a), 201(b), and 202(a) of the Act, and the Resale Rule.³⁴ In particular, the Petition asserts that AirTouch violated the Act by: (1) denying Nova favorable rate plans that were offered to other AirTouch customers; (2) denying Nova electronic billing made available to other customers and not offering Nova electronic billing that required little or no modification to AirTouch's existing billing system; (3) refusing to provide Nova manual credits, as an alternative to electronic billing; and (4) unreasonably discriminating against Nova in responding to requests for rate plan changes.³⁵ Like the District Court Complaint, the Petition challenges as invalid AirTouch's justification for not offering Nova favorable rate plans that were available to AirTouch's other customers – *i.e.*, that AirTouch's "electronic billing system is incapable of providing a billing format that would allow a customer to resell the service."³⁶

²⁹ Petition, Exhibit 1 (District Court Complaint) at 4-6, ¶¶ 15-19.

³⁰ *Id.* at 5-6, ¶ 19.

³¹ Nova Consolidated Reply, Exhibit 13 (Defendant AirTouch Cellular's Notice of Motion to Dismiss the First Amended Complaint, *Nova Cellular West, Inc. dba San Diego Wireless v. AirTouch Cellular, Inc.*, No. C 99-2142 [CAL], United States District Court, Northern District of California (filed June 29, 1999)) at 1-2.

³² Petition, Exhibit 2 (Order Granting in Part and Denying in Part AirTouch Cellular's Motion to Dismiss the First Amended Complaint, *Nova Cellular West, Inc. dba San Diego Wireless v. AirTouch Cellular, Inc.*, No. C 99-2142 [CAL], United States District Court, Northern District of California (dated Oct. 8, 1999)) at 2.

³³ *Id.*

³⁴ *Id.* at 1, 6-10.

³⁵ *Id.* at 2. See also Nova Consolidated Reply at 1-3; Opening Brief of Nova Cellular West, Inc. d/b/a San Diego Wireless Communications, File No. ENF-00-002 (filed Apr. 13, 2001) ("Nova Opening Brief") (Summary) at 1; Reply Brief of Nova Cellular West, Inc. d/b/a San Diego Wireless Communications, File No. ENF-00-002 (filed May 4, 2001) ("Nova Reply Brief") at i, 1-8.

³⁶ Petition at 5-6. See Nova Opening Brief at 5-6; Nova Consolidated Reply at 16-17; Nova Reply Brief at 8. AirTouch filed a Motion to Dismiss, and later an Application for Review, asserting that the manner in which

(continued....)

III. DISCUSSION

A. The Settlement and Release Bars Nova's Claims Relating to Electronic Billing.

14. AirTouch asserts as one of its threshold defenses that the Settlement and Release, which resolved the CPUC Proceeding, constitutes a waiver of Nova's claims in the pending Petition.³⁷ To a significant extent, we agree. Specifically, as discussed below, we find that the Settlement and Release applies and bars the claims in the Petition that hinge on the electronic billing tape dispute that is the subject of the Settlement and Release. Nova's sole remedy regarding these claims, as stipulated in the Settlement and Release itself, is to seek enforcement of that agreement under California law.

15. The Petition is a continuation of the long-running dispute between Nova and AirTouch regarding the provision of electronic billing tapes for resale purposes. The 1996 CPUC Complaint challenged AirTouch's unwillingness to provide Nova with electronic billing tape in connection with AirTouch retail plans.³⁸ In order to resolve the CPUC Proceeding, the parties, both represented by counsel, entered into the Settlement and Release. The Settlement and Release obligated AirTouch to provide in the future electronic billing tapes for any rate plan – retail or otherwise – whenever it was “capable” of doing so.³⁹ Based explicitly on that promise going forward, Nova released all claims, existing and in the future, “arising out of the matters

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Commission staff structured this proceeding deprived AirTouch of a fair opportunity to respond to Nova's allegations. Motion to Dismiss, File No. ENF-00-02 (filed Apr. 3, 2000) (“Motion to Dismiss”); Application for Review, File No. ENF-00-002 (filed Sept. 11, 2000) (“Application for Review”). AirTouch's assertions are meritless. The Commission has broad discretion in managing its proceedings. *See* 47 U.S.C. §§ 154(i) and 154(j); *see also Global Crossing Telecommunications, Inc. v. FCC*, 259 F.3d 740, 748 (D.C. Cir. 2001) (the Commission “enjoys wide discretion in fashioning its own procedures,” and is authorized by section 208 “to investigate a complaint ‘in such a manner and by such means as it shall deem proper’”) (quoting *City of Angels Broad., Inc. v. FCC*, 745 F.2d 656, 664 (D.C. Cir. 1984); 47 U.S.C. § 208). In doing so here, Commission staff afforded AirTouch ample opportunity to respond to Nova's allegations. In particular, Commission staff permitted AirTouch to conduct significant discovery and file several briefs responding to Nova's claims. *See, e.g.,* Reply of AirTouch Cellular, File No. ENF-00-002 (filed Apr. 18, 2000) (“Reply”); Initial Brief of AirTouch Cellular, File No. ENF-00-002 (filed Apr. 13, 2001) (“AirTouch Initial Brief”); Reply Brief of AirTouch Cellular, File No. ENF-00-002 (filed May 4, 2001) (“AirTouch Reply Brief”). Indeed, the record in this proceeding is quite voluminous – the parties took four depositions and submitted a total of more than 100 exhibits. Further, contrary to AirTouch's assertion, Commission staff expressly ruled that Nova bears the burden of proof. Letter from Roderick A. Mette, Attorney, Market Disputes Resolution Division, Enforcement Bureau, to Peter A. Casciato, counsel for Nova, and Kenneth D. Patrich, counsel for AirTouch, File No. ENF-00-02 (dated Apr. 21, 2000). In any event, because we are denying the Petition, we dismiss as moot both the Motion to Dismiss and the Application for Review.

³⁷ Response to Petition at 30, ¶¶ 72-73; AirTouch Initial Brief at ii, 22-23.

³⁸ Nova Consolidated Reply, Exhibit 16 (CPUC Complaint) at 2.

³⁹ Petition, Exhibit 11 (Settlement and Release) at 2, ¶ 4. The Resale Rule requires CMRS carriers to provide electronic billing only if it can be made available “without significant alterations” to the carrier's system. *See Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Memorandum Opinion and Order on Reconsideration, FCC 99-250, 17 Comm. Reg. (Pike & Fisher) 518, ¶ 54 (rel. Sept. 27, 1999) (“*CMRS Resale Reconsideration Order*”). Nova construes the affirmative obligation contained in Paragraph 4 of the Settlement and Release as holding AirTouch to a stricter standard, contending that AirTouch must provide electronic billing tapes whenever it is capable of doing so, regardless of the scope of alterations necessary. *See* Nova Consolidated Reply at 16-17.

involved” in the CPUC Proceeding – *i.e.*, the electronic billing tape dispute.⁴⁰ In other words, the release (Paragraph 1) expressly is conditioned upon AirTouch’s compliance with its agreement to provide billing tape in connection with any future rate plan when it was “capable of doing so” (Paragraph 4).⁴¹

16. In our view, the broad release language contained in Paragraph 1 of the Settlement and Release, coupled with the future obligation regarding AirTouch’s provision of electronic billing tapes contained in Paragraph 4 of the Settlement and Release, means that Nova has released any future claims regarding AirTouch’s obligation to provide electronic billing tapes, except a claim seeking enforcement under California law of the provisioning obligation contained in the Settlement and Release itself. Although releases typically do not cover claims based on post-release conduct, the unique combination of Paragraphs 1 and 4 leads us to conclude that that is precisely what the parties intended here. Reading these Paragraphs in tandem, Nova obtained a promise from AirTouch regarding the provision of electronic billing tapes for future retail rate plans in exchange for Nova relinquishing its right to seek redress regarding such provision by means other than enforcement of the Settlement and Release. In other words, Nova expressly and deliberately waived its right to assert that AirTouch’s conduct regarding the provisioning of electronic billing tapes violates the Act.

17. Nova disagrees that the release (contained in Paragraph 1 of the Settlement and Release) applies to all claims under the Act arising from AirTouch’s going-forward obligation (contained in Paragraph 4 of the Settlement and Release) to provide electronic billing tape.⁴² In particular, Nova suggests that the release relates solely to claims concerning the Easy 21 Plan that was specified in the CPUC Complaint, while the billing tape condition pertains to all present and future retail plans.⁴³

18. We do not read the release so narrowly. Its language is not limited to the Easy 21 Plan, or to rate plans enumerated in the CPUC Complaint. Rather, the release, by its terms, applies to all claims “arising out of the matters involved in” the CPUC Complaint.⁴⁴ In the CPUC Proceeding, Nova sought to enjoin AirTouch from billing Nova under a “rate plan other than the Easy 21 Plan ... *or such other favorable plan* that the complainant and defendant agree upon.”⁴⁵ The matters arising out of the CPUC Proceeding thus transcend the Easy 21 Plan. Paragraph 4 of the Settlement and Release, which expressly applies to future AirTouch rate plans, without limitation, further illustrates the breadth of the relief sought by Nova in the CPUC Proceeding.⁴⁶

19. Nova’s strained construction of the Settlement and Release thus ignores the

⁴⁰ Petition, Exhibit 11 (Settlement and Release) at 1, ¶ 1.

⁴¹ *Id.* at 1 (“[U]pon satisfaction of the conditions set forth at Paragraph 4 below, the parties agree as follows ...”).

⁴² Nova Consolidated Reply at 16-17.

⁴³ See Nova Consolidated Reply at 17; Nova Reply Brief at 8.

⁴⁴ Petition, Exhibit 11 (Settlement and Release) at 1, ¶ 1.

⁴⁵ Nova Consolidated Reply, Exhibit 16 (CPUC Complaint) at 3-4 (emphasis added).

⁴⁶ Petition, Exhibit 11 (Settlement and Release) at 2, ¶ 4; see also Petition, Exhibit 8 (Wheatland District Court Declaration) at 2, ¶ 5.

inclusive wording of the release and the scope of the CPUC Complaint. Moreover, Nova's interpretation overlooks the fact that the release specifically was conditioned on AirTouch's agreement with respect to all future rate plans.⁴⁷ Consequently, we think that the Settlement and Release, fairly read as a whole, releases all claims in the Petition pending before us that relate to the electronic billing tape dispute.⁴⁸ Nova's sole remedy for a breach of AirTouch's obligation in Paragraph 4 to provide electronic billing tape is to seek enforcement of that Paragraph pursuant to California law.⁴⁹ Therefore, we must determine whether Nova's claims under the Act in this proceeding hinge on the scope of AirTouch's obligation under the Settlement and Release to provide electronic billing tapes. Such claims, to the extent they exist, must be dismissed as waived.

20. The gist of Nova's Petition pertains to precisely the same dispute about AirTouch's provision (or lack thereof) of electronic billing tapes that Nova asserted was at issue in the CPUC Proceeding. In particular, Nova's Petition acknowledges that, in order to establish the violations of the Act alleged, Nova must demonstrate "AirTouch's *capability* to provide an electronic billing format."⁵⁰ In fact, in the district court case, Nova unequivocally stated that all of its Communications Act claims hinge on the billing tape dispute:

This lawsuit arises from the incredulity of AirTouch's claim that their "currently existing billing system" was incapable of providing Nova with retail rates in an electronic format [Nova] alleges that AirTouch's continuing claim that they lacked the capability to bill plaintiff accordingly was without merit.

* * *

[T]his is a straightforward dispute over AirTouch's refusal to provide [Nova] with a billing tape.⁵¹

Indeed, Nova admits that the Settlement and Release covers the conduct at issue here.

⁴⁷ Nova further suggests that the Commission somehow can avoid deciding the waiver issue, because its claim that AirTouch breached the Settlement and Release is covered by the state causes of action for intentional misrepresentation and unfair business practices, which the federal district court stayed. Nova Consolidated Reply at 17-18. Regardless of the substance of any state law claim, however, the Settlement and Release between Nova and AirTouch released all claims under the Act relating to the billing dispute and thus bars such claims here.

⁴⁸ See, e.g., *In re: Crystal Properties, Ltd.*, 268 F.3d 743, 748 (9th Cir. 2001) (quoting *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1032 (9th Cir. 1989)) (under California law, a "written contract must be read as a whole and every part interpreted with reference to the whole.").

⁴⁹ Petition, Exhibit 11 (Settlement and Release) at 5, ¶ 4.

⁵⁰ Petition at 5-6 (emphasis added). This is consistent with the District Court Complaint, which alleges that AirTouch refused to provide various rate plans and promotions to Nova "because an electronic billing format for these offerings has not been developed for resellers." Petition, Exhibit 1 (District Court Complaint) at 5-6, ¶ 19. According to Nova, "[t]he detailed electronic bill NOVA receives from AIRTOUCH provides the call detail necessary for NOVA to bill its own customers. AIRTOUCH'S unwillingness to provide an electronic bill for any service offering thus insulates any such service offering from resale, thereby discriminating against NOVA and similarly-situated resale customers." *Id.*

⁵¹ Response to Petition, Exhibit 6 (Plaintiff's Opposition to Defendant's Motion to Dismiss the First Amended Complaint) at 1.

Specifically, in support of its claim that AirTouch acted unreasonably, Nova affirmatively contends that AirTouch's conduct ***breaches the Settlement and Release*** because, according to Nova, AirTouch is capable of providing electronic billing tape to Nova by one method or another.⁵² Therefore, with only a couple of exceptions addressed below,⁵³ Nova's purported claims under the Act here fall within the scope of the Settlement and Release, and hence must be dismissed as waived.

21. A closer examination of the particulars of Nova's claims buttresses this conclusion, because each of these claims hinges on AirTouch's conduct regarding the provision of electronic billing tapes. As set forth above, the Petition specifies four ways in which AirTouch allegedly violated the Act. First, the Petition alleges that AirTouch denied Nova 20 retail (and five wholesale) rate plans that were offered to other customers.⁵⁴ Nova alleges that it could not take advantage of those retail plans "because AirTouch did not offer or make available to Nova any form of electronic billing with those plans."⁵⁵ Therefore, to the extent that Nova bases its claim on these retail plans, the claim is barred by the Settlement and Release. We note that the five ***wholesale*** plans cited by Nova, however, do not appear to relate to the electronic billing issue. Consequently, Nova has not relinquished its rights to have us decide claims under the Act regarding those plans, and we address them below.⁵⁶

22. Second, the Petition alleges that AirTouch failed to afford Nova a form of electronic billing with its rate plans, thereby denying Nova the ability to resell cellular services on the same terms and conditions provided to other AirTouch customers.⁵⁷ This claim explicitly rests upon the electronic billing dispute and, accordingly, the Settlement and Release bars the claim.

23. Third, the Petition alleges that, if AirTouch proves that it could not provide electronic billing to Nova, then AirTouch failed manually to adjust its monthly bills to Nova and calculate appropriate credits so that Nova would receive the same rates as AirTouch's other customers.⁵⁸ In other words, Nova contends that AirTouch could have compensated for its failure to provide electronic billing by manually adjusting Nova's bills each month.⁵⁹ We view this alternative argument as part and parcel of the underlying dispute regarding electronic billing covered by the Settlement and Release, in which AirTouch committed to supply electronic billing tape to Nova whenever AirTouch was capable of doing so. Nova's contention that AirTouch has breached this commitment – by failing to provide manual credits or otherwise –

⁵² Petition at 5; Nova Opening Brief at 15-16.

⁵³ See Section III(B), *infra*.

⁵⁴ Petition at 2-6, 8; see Nova Consolidated Reply at 3, 14-18; Nova Opening Brief at 1-2 (Summary), 2-5; Nova Reply Brief at 6-7; Further Evidentiary Submission of Nova Cellular West, Inc. dba San Diego Wireless, File No. ENF-00-002 (filed Dec. 5, 2000) ("Nova Further Submission"), Exhibit 22 (Declaration of Paul Wheatland) ("Wheatland Declaration") at 1, ¶ 2.

⁵⁵ *Id.* at 4, ¶ 8.

⁵⁶ See Section III (B), *infra*.

⁵⁷ Petition at 2-6, 8-9; see Nova Opening Brief at 1-4 (Summary), 5-14; Nova Reply Brief at 2-3.

⁵⁸ Petition at 2, 9-10; see Nova Opening Brief at 1, 4 (Summary), 14-15; Nova Reply Brief at 2-3.

⁵⁹ Nova Opening Brief at 15.

falls within the scope of the Settlement and Release.⁶⁰

24. Fourth, the Petition claims that AirTouch failed to change rate plans offered to Nova in the same timely manner that AirTouch changed rate plans for other customers.⁶¹ This claim does not concern AirTouch's conduct regarding the provision of electronic billing tapes. Thus, the Settlement and Release does not appear to bar this claim. Accordingly, we will analyze it on the merits below.⁶²

25. In sum, because the parties have entered into the Settlement and Release agreement, we do not need to determine if the actions of AirTouch with regards to the electronic billing tape in the instant proceeding are in violation of the Act. If Nova wishes to pursue those claims, it must do so through enforcement of the Settlement and Release under California law. Accordingly, we deny Nova's Petition with respect to those claims. Consequently, only two of Nova's claims remain – whether AirTouch unlawfully denied Nova access to five wholesale rate plans that AirTouch offered to other customers, and whether AirTouch unreasonably discriminated against Nova by not timely responding to Nova's rate plan change requests.

B. Nova Failed to Submit Adequate Proof of Its Remaining Claims.

1. Access to Wholesale Plans

26. According to the Petition, AirTouch denied Nova access to rate plans that AirTouch offered to other customers, in violation of sections 201(a), 201(b), and 202(a) of the Act, as well as the Resale Rule.⁶³ Specifically, the Wheatland Declaration identifies five wholesale plans in AirTouch's discovery responses that "AirTouch never made available to Nova and that Nova did not even know existed until AirTouch" served its discovery responses.⁶⁴ Mr. Wheatland notes that these five plans would have been more favorable to Nova than the wholesale plans that AirTouch actually offered to Nova during the dispute period.⁶⁵

27. The AirTouch discovery response referenced in the Wheatland Declaration is Table 3, which lists AirTouch rate plans and the dates they were available.⁶⁶ In the cover letter accompanying Table 3, counsel for AirTouch indicated that AirTouch compiled the information contained in the table by searching numerous databases, and that plans could have been listed that never were actually made available to any customer.⁶⁷ AirTouch later corrected Table 3, stating that the five wholesale plans in question were "never actually 'rolled out' commercially

⁶⁰ Petition, Exhibit 11 (Settlement and Release) at 5, ¶ 14.

⁶¹ Petition at 2.

⁶² See Section III (B), *infra*.

⁶³ Petition at 2, 6-8. See Nova Consolidated Reply at 1-3, 13-21; Nova Opening Brief at 2-5, 22-25.

⁶⁴ Nova Further Submission, Exhibit 22 (Wheatland Declaration) at 1, ¶ 3. See Nova Opening Brief at 2-3; Nova Reply Brief at 6-7.

⁶⁵ Nova Further Submission, Exhibit 22 (Wheatland Declaration) at 1, ¶ 3.

⁶⁶ Nova Further Submission, Exhibit 23.

⁶⁷ *Id.*, Letter dated November 9, 2000 to Peter Casciato, counsel for Nova, from Timothy J. Cooney, counsel for AirTouch, at 1 n.1.

and made available to any customer.”⁶⁸ In response, Nova submitted no contrary evidence. Consequently, Nova has not established that AirTouch ever made available to any of its customers the five wholesale plans identified by Mr. Wheatland. Therefore, Nova has failed to submit sufficient proof of its claim that it was denied access to those plans.

2. Rate Plan Changes

28. The Petition alleges that AirTouch unreasonably discriminated against Nova, in violation of section 202(a), by failing “to change rate plans for [Nova] in the same timely ... manner that it changed rate plans for its other customers.”⁶⁹ In resolving discrimination claims under section 202(a), the Commission employs a three-step inquiry: (1) whether the services at issue are “like”; (2) if so, whether there are differences in the terms and conditions pursuant to which the services are provided; and (3) if there are such differences, whether they are reasonable.⁷⁰ When a complainant establishes the first two components, the burden of persuasion shifts to the defendant carrier to justify the discrimination as reasonable.⁷¹ As discussed below, we find that Nova has failed to demonstrate that there were differences in the terms and conditions under which AirTouch provided like communication service; we further find that, in any event, any discrimination was reasonable.

29. Nova bases its allegation of discriminatory treatment primarily on the fact that, as a general rule, AirTouch changes cellular rate plans more quickly for retail customers than for resellers. Specifically, Nova contends that (1) AirTouch changes rate plans for a retail customer within one business day, while AirTouch takes 20 business days or more to change rate plans for a reseller, and (2) AirTouch requires less change documentation from retail customers than resellers.⁷²

30. In support of this claim, Nova again relies on the Wheatland Declaration, which states that, as an AirTouch retail customer, Mr. Wheatland is able to effectuate a rate plan change by telephone in one day.⁷³ In addition, Nova relies on AirTouch’s interrogatory response indicating that retail customers typically request such a change by telephone, and that “[t]he rate plan change becomes effective as agreed upon with the customer but no sooner than the next business day.”⁷⁴ According to that interrogatory response, AirTouch representatives provide retail customers the option of changing rate plans at the end of the current billing cycle (which

⁶⁸ AirTouch Exhibits, Vol. II, File No. ENF-00-02 (filed Apr. 4, 2001), Exhibit 65 (Letter dated January 3, 2001 from Timothy J. Cooney, counsel for AirTouch, to Peter Casciato, counsel for Nova) at 1-2.

⁶⁹ Petition at 2. *See id.* at 10; Nova Opening Brief at 16-18. Nova suggests that the alleged discriminatory treatment also violates section 201. *Id.* Because the conduct at issue is discrimination, we view these claims to be the same. Therefore, we analyze the claim under section 202(a), which, as discussed below, entails a burden-shifting analysis that is more favorable to the Complainant.

⁷⁰ *See, e.g., MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990).

⁷¹ *See id.* *See also National Communication Ass’n, Inc. v. AT&T Corp.*, 238 F.3d 124, 129-30 (2d Cir. 2001).

⁷² Nova Opening Brief at 16-17.

⁷³ Nova Further Submission, Exhibit 22 (Wheatland Declaration) at 9-10, ¶ 15.

⁷⁴ Nova Further Submission, Exhibit 18 (Response to Interrogatory No. 9) at 11-12.

AirTouch prefers).⁷⁵

31. With regard to resellers, AirTouch's discovery responses reveal that AirTouch requires some documentation to effectuate a plan change. Prior to November 1998, resellers had to submit rate plan change requests to AirTouch either on a prepared form or by letter listing each mobile phone number for which the change was requested.⁷⁶ This process purportedly took longer for reseller rate plan changes than for retail rate plan changes, because AirTouch needed to alter the service record of each individual customer served by the reseller.⁷⁷ After November 1998, AirTouch still required resellers to submit the rate plan change requests via faxed forms; however, AirTouch's computer system then was able to process the changes in batches, rather than individually.⁷⁸ Nevertheless, the change request form states that "AirTouch will make reasonable efforts to process the rate plan changes requested within twenty days" after AirTouch accepts the request in writing.⁷⁹

32. This record falls short of establishing a violation of section 202(a). Beyond Mr. Wheatland's anecdotal recollection that, as a retail customer, he could change rate plans in a single day, there is no evidence of how quickly AirTouch actually effectuates retail rate plan changes. Rather, the record only indicates that AirTouch and the customer agree on the effective date of any retail plan change, and that AirTouch preferred to make such changes effective as of the end of a billing cycle.⁸⁰ Thus, the record does not permit us to conclude that AirTouch does, in fact, treat resellers differently than retail customers regarding change requests. Moreover, AirTouch's practice, based on this record, appears to be reasonable. Nova does not dispute that making rate plan changes for a reseller that has numerous individual mobile phone subscribers could be more time consuming than making such a change for a single retail customer. Nor is there any basis for disputing that requiring resellers to submit a written request on a standardized form is reasonable.

33. Nova alleges further examples of "damaging, unreasonably discriminatory treatment."⁸¹ First, Nova asserts that it requested a credit for AirTouch's 11-day delay in changing a wholesale rate plan as requested in May 1997, and that AirTouch did not approve the credit for almost nine months.⁸² Nova provides no information about the timing of a comparable credit for a similarly-situated retail customer. Thus, Nova has failed to establish a *prima facie* case of discrimination under section 202(a).

34. Second, Nova argues that, in November 1998, AirTouch discontinued two of its wholesale rate plans with only one day notice, and that AirTouch forced Nova to choose new

⁷⁵ *Id.*

⁷⁶ *Id.*, Exhibit 18 (Response to Interrogatory No. 10) at 12.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 12-13.

⁸⁰ *Id.*, Exhibit 18 (Response to Interrogatory No. 9) at 11-12.

⁸¹ Nova Opening Brief at 17.

⁸² Nova Further Submission, Exhibit 22 (Wheatland Declaration) at 8, ¶ 12 and Attachment G; Nova Opening Brief at 17.

wholesale rate plans that were less favorable, “without according Nova the benefits of the AirTouch policy that allowed customers to receive plans beyond the stated expiration date.”⁸³ Correspondence attached to the Wheatland Declaration confirms that Nova was unhappy with the one-day notice, but it also confirms that AirTouch sent all resellers, including Nova, the same notification at the same time.⁸⁴ Again, therefore, Nova has not established a violation of section 202(a), based on this record.⁸⁵

35. Finally, Nova complains that in February 1999, it requested a wholesale rate plan change and that, despite ultimately submitting the requisite standard form on March 24, 1999, AirTouch never complied with the request.⁸⁶ Nova makes no suggestion that AirTouch did not require other similarly-situated customers to submit such wholesale rate plan change requests in writing. Moreover, as indicated above, Nova has not demonstrated that AirTouch’s process for changing wholesale rate plans is unreasonable. Furthermore, Nova overlooks the fact that, after demanding payment, AirTouch terminated service to Nova on May 1, 1999. We cannot conclude that AirTouch acted unreasonably in not changing Nova’s wholesale rate plan when Nova apparently had not paid for service. Yet again, therefore, Nova has not established a violation of section 202(a), based on this record.

IV. CONCLUSION

36. In sum, we conclude that Nova’s claims relating to AirTouch’s failure to provide electronic billing tape are the subject of the Settlement and Release. Thus, Nova cannot assert those claims in this proceeding, and we deny this aspect of its Petition. Nova’s proper recourse is to seek enforcement of the Settlement and Release under California law, as provided in that agreement. In addition, because Nova failed to submit sufficient evidence, we also deny its remaining claims relating to (1) denial of access to five wholesale plans, and (2) discrimination in the time it takes AirTouch to respond to rate plan change requests.⁸⁷

⁸³ Nova Opening Brief at 17; Nova Further Submission, Exhibit 22 (Wheatland Declaration) at 8-9, ¶ 13.

⁸⁴ Nova Further Submission, Exhibit 22 (Wheatland Declaration), Attachment H.

⁸⁵ Nova further alleges that, in November 1998, it sought the equipment discounts and expanded local coverage available in AirTouch retail plans. Nova Opening Brief at 18; Nova Further Submission, Exhibit 22 (Wheatland Declaration) at 9, ¶ 14. This dispute, too, involves AirTouch’s failure to provide electronic billing tapes to resellers in connection with retail plans and thus is barred by the Settlement and Release, for all of the reasons explained in Section III (A), *supra*.

⁸⁶ Nova Opening Brief at 18; Nova Further Submission, Exhibit 22 (Wheatland Declaration) at 9-10, ¶ 15 and Attachment I.

⁸⁷ Two Nova motions to strike AirTouch exhibits remain pending. Motion to Strike or Exclude AirTouch Cellular Proposed Exhibits from the Evidentiary Record, File No. ENF-00-002 (filed May 4, 2001); Further Motion to Strike or Exclude AirTouch Cellular Proposed Reply Brief Exhibits from the Evidentiary Record, File No. ENF-00-002 (filed May 23, 2001). Because both motions pertain to exhibits on which this Order does not rely, we dismiss both motions as moot. In addition, on December 5, 2000, Nova filed a motion for the public release of AirTouch Table 3, which lists AirTouch rate plans and the dates they were available during the dispute period. Motion of Nova Cellular West, Inc. for Public Release of AirTouch Table 3, File No. ENF-00-002 (filed Dec. 5, 2000). Given the disposition of this Petition, we also dismiss this motion as moot.

V. ORDERING CLAUSES

37. ACCORDINGLY, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201, and 202(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, and 202(a), and section 20.12 of the Commission's rules, 47 C.F.R. § 20.12, that the Petition filed by Nova against AirTouch IS DENIED in its entirety.

38. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), and 154(j), that the Motion to Dismiss, filed on April 3, 2000; the Application for Review, filed on September 11, 2000; the Motion to Strike or Exclude AirTouch Cellular Proposed Exhibits from the Evidentiary Record, filed on May 4, 2001; and the Further Motion to Strike or Exclude AirTouch Cellular Proposed Reply Exhibits from the Evidentiary Record, filed on May 23, 2001, ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary